In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1983

WILCOX COUNTY BOARD OF EDUCATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A17) is reported at 494 F. 2d 575. The opinion of the district court (Pet. App. A18-A45) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1974. A timely petition for rehearing was denied on June 7, 1974. The petition for a writ of certiorari was filed on July 5, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that it is constitutionally impermissible in the circumstances of this case to include in a school desegregation plan a minority-to-minority transfer provision under which white students may transfer to any school in the system and black students may transfer to none.

2. Whether the court of appeals correctly ordered the district court to implement educational recommendations designed to improve the quality of education and facilitate desegregation in the school district.

STATEMENT

The United States instituted this school desegregation suit involving the Wilcox County, Alabama, school system on November 22, 1965, in the United States District Court for the Southern District of Alabama, pursuant to Section 407 of the Civil Rights Act of 1964, 78 Stat. 248, 42 U.S.C. 2000c-6 (Pet. App. A18). The district court found that petitioners were operating dual school system based on race and ordered them to formulate a desegregation plan.[1] Thereafter, the court of appeals, upon the motion of the original and intervening plaintiffs, vacated the district court's order and remanded the case to the district court for reconsideration in light of *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, on rehearing *en banc*, 380 F. 2d 385 (C.A. 5).

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[1]The district court ruled that there was insufficient time to begin desegregation for the 1966-1967 school year. On August 25, 1966, the United States applied to the court of appeals for an injunction pending appeal, requesting that desegregation begin immediately. The court of appeals ordered the district court to implement a "freedom of choice" plan for the 1966 Fall term for grades 1-3 and grades 7-9. The district court thereafter restrained the petitioners from acting in any manner which would frustrate the freedom of choice plan.

The district court then formulated a "freedom of choice" desegregation plan for the Wilcox County School System. After this Court's decision in *Green* v. *County School Board*, 391 U.S. 430, the district court ordered the Office of Education of the Department of Health, Education, and Welfare, to draft a desegregation plan for a unitary school system.[2] With some extensive modifications, the HEW plan was approved by the district court.[3]

The private plaintiffs appealed. On January 10, 1972, the court of appeals remanded the case to the district court (Pet. App. A46-A48) with directions to order petitioners to desegregate immediately the faculty and staff of the school district, to institute system-wide procedures for majority-to-minority transfer of students, to re-examine the transportation system, to adopt policies covering school construction and site selection, and to prepare and file semi-annual reports (Pet. App. A46-A47). In addition, the district court was directed to hold a hearing to resolve certain specified issues (Pet. App. A47).[4] The United

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[2]The plan was to include provisions concerning desegregation of faculty and staff, majority-to-minority transfer policy, school construction and site selection, and attendance outside the system of residence.

[3]The district court rejected HEW's proposal to consolidate the schools in the system and adopted, instead, petitioners' plan, which was based on student attendance zones.

[4]The district court was directed to determine whether the school system was discriminating on the basis of race in disciplining students, in maintaining buildings and distributing equipment, and in hiring and discharging teachers. It was also instructed to determine the actual pupil racial results of the HEW plan as modified by the district court, and the projected enrollments, by race, of HEW's plan if it were to be implemented without modification.

States contended at that hearing that petitioners were operating a racially discriminatory school system with respect to each of the matters at issue.[5]

The district court adopted most of the educational recommendations made by the Office of Education's Title IV General Assistance Center at the University of South Alabama (Pet. App. A30-A36). The court rejected the Title IV Center's recommendations for pairing of the white and black schools in the Camden attendance area, requiring instead the establishment of a twelve-grade school at the traditionally white Wilcox County High.[6] It also added a minority-to-minority transfer provision.

Since the white students are a minority in the system as a whole and in each school within the system, the effect of the district court's plan would have been to permit every white student in grades K-12 to transfer to and attend a single school, Wilcox County High School. Black students, however, since they are in the majority in each school, would not have been free to transfer and would have been required to attend the schools to which they were assigned on the basis of geographic attendance zones.

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[5]Specifically, the United States contended that petitioners maintained buildings and distributed equipment on a racially discriminatory basis, denied black students books and learning materials on the basis of race, discriminatory disciplined black students who attempted to exercise their rights, segregated black students in classrooms, dismissed black teachers, aides, and other staff on the basis of race, and operated schools pursuant to a plan that held no promise to equalize educational opportunities.

[6]At the opening of the 1973-1974 school year, Wilcox County High enrolled 466 black students and 105 white students, while Camden Academy enrolled 956 black students and no white students (Pet. App. A5, n. 1). These schools are within a mile of each other (Pet. App. A11).

The court of appeals reversed the district court's order insofar as it failed to pair the schools in the Camden area and permitted minority-to-minority transfers. The court ruled that the Title IV Center's pairing recommendations for the Camden area schools should be implemented for the 1974-1975 school year (Pet. App. A12).[7]

ARGUMENT

The decision of the court of appeals is correct, and there is no reason for further review.

1. Petitioners contend that the minority-to-minority transfer provision was necessary to prevent "a totally black school system" (Pet. 12). But that provision would have precluded most black students from attending the only integrated school in the system. The court of appeals thus correctly concluded that, as applied in the context of this school system, "the minority to minority transfer provision imposes a condition which is racially biased in every respect except literal appellation" (Pet. App. A12).

The court of appeals correctly distinguished its prior *en banc* decision in *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211, 1221 (St. John the Baptist Parish, Louisiana), where a small number of minority white students were allowed to cluster in one portion of a predominantly black school system. In that case, black students from other attendance areas were also permitted to transfer to the desegregated school. As the court stated in the present case (Pet. App. A11-A12):

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[7]On July 30, 1974, Mr. Justice Powell denied petitioners' application for a stay.

> [N]either the physical situations of the two school districts nor the remedies utilized by the court there and here are sufficiently similar to warrant affirmance. St. John the Baptist Parish is divided by the Mississippi River. Its East bank schools were operated by the district on an integrated basis. The district court permitted West bank students to exercise freedom of choice in selecting the school they wished to attend. In contrast, the record here indicates that the Wilcox County School Board has yet to objectively demonstrate its will to operate this system in a manner calculated to remedy past discriminatory practices and achieve unitary status. * * * If and when this School Board removes itself from the shadow of contempt, the district court may then consider whether a racially neutral freedom of choice plan could be of benefit in bringing about a unitary system.

2. Petitioners also argue (Pet. 13-17) that the district court has no "authority to place into operation the Title IV Plan which is both impracticable and economically impossible for the Wilcox County system" (Pet. 15). They argue that the courts no longer have any legitimate function in this case, because "the school system has become a unitary system and all vestiges of a dual system have been eliminated" (Pet. 15).

The court of appeals stated to the contrary, however, that "the Wilcox County School Board has yet to objectively demonstrate its will to operate this system in a manner calculated to remedy past discriminatory practices and achieve unitary status" (Pet. App. A12). It accordingly concluded, correctly in our view, that, with the school board still in "the shadow of contempt," "the district court erred in rejecting the general concept of the plan submitted by the Title IV Center for the consolidation of the Camden area schools" (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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